APPENDIX

Supreme Court, U. S.
FILED
DEC. 27 1974
MICHAEL RODAK, JR.

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-215

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN R. PARK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED AUGUST 30, 1974
CERTIORARI GRANTED NOVEMBER 11, 1974

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-215

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN R. PARK

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Docket Entries	1
Criminal Information for Violation of Food, Drug and Cosmetic Act, filed March 7, 1973	4
Motion of defendant John R. Park for Bill of Particulars, filed April 6, 1973	10
Answer of United States to Motion for Bill of Particulars filed April 16, 1973	14
Transcript of Proceedings held before the Honorable Joseph H. Young in the United States District Court for the District of Maryland on May 9 and May 10, 1973	16
Testimony of Gorden K. Brown	
—direct—[40]	19
—cross—[82]	25

Page

Transcript of Proceedings held before the Honorable Joseph H. Young in the United States District Court for the District of Maryland on May 9 and May 10, 1973—Continued

Testimony of Gorden K. Brown—Continued

—redirect—[91] 29

—recross—[95] 29

Testimony of Norman Kramer

—direct—[113] 30

—cross—[119] 32

—redirect—[123] 34

Testimony of Robert W. McCahan

—direct—[124] 34

—cross—[127] 35

—redirect—[136] 38

Testimony of A. E. Gilfillan

—direct—[140] 39

—cross—[142] 40

—redirect—[144] 41

Testimony of John R. Park

—direct—[154] 42

—cross—[167] 48

—redirect—[179] 55

—recross—[180] 56

—redirect—[180] 56

—recross—[181] 57

Government Exhibit 23 64

Government Exhibit 24 66

Government Exhibit 27 70

Judgment of Conviction 72

Government's Requested Instruction No. 3 72

*Opinion of the United States Court of Appeals for the Fourth Circuit, filed July 2, 1974 ..... Pet. App. 1a

*Judgment of the United States Court of Appeals for the Fourth Circuit, filed July 2, 1974 ..... Pet. App. 13a

Order of the Supreme Court dated November 11, 1974, granting the petition for a writ of certiorari 73

* Not reprinted in Joint Appendix. Citations are to appendix of Petition for Writ of Certiorari.

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-1953

UNITED STATES OF AMERICA, APPELLEE

v.

JOHN R. PARK, APPELLANT

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
8/ 2/73	Record on appeal in one volume filed, and appeal docketed.
8/ 2/73	Transcript of proceedings on May 9, 1973, in one volume; on May 10, 1973, in one volume; on May 25, 1973, in one volume; and on July 5, 1973, in one volume, filed. (All contained in one envelope)
8/ 2/73	Exhibits in one envelope received from the clerk of the district court at Baltimore, Md.
8/ 2/73	Briefing schedule established.
8/ 9/73	Appearance for appellee filed and entered.
8/10/73	Appearance for the appellant filed and entered.
9/10/73	Appellant's motion to defer preparation of the appendix pursuant to Rule 30(c) of the Federal Rules of Appellate Procedure, filed.
9/10/73	Order allowing appellant to defer preparation of the appendix pursuant to Rule 30(c), FRAP, filed.
9/12/73	One typewritten brief for appellant, filed.
9/12/73	Appellant's designation of portions of the record below and other items to be printed in the appendix, filed.

DATE	FILINGS—PROCEEDINGS
10/ 9/73	Notice of oral argument mailed. to Linton, Byrd, and Hendrickson.
10/12/73	Twenty-five (25) copies of the appellee's brief filed.
10/23/73	Four (4) copies of the appellant's Jt. appendix filed.
10/24/73	Forty (40) copies of the appellant's Jt. appendix filed.
10/25/73	Twenty-five (25) copies of the appellant's brief filed.
10/30/73	Twenty-five (25) copies of the appellant's reply brief filed.
11/ 7/73	Cause argued before Boreman, Senior Circuit Judge, Craven and Field, Circuit Judges, and submitted.
11/12/73	Appearance for the appellant filed and entered.
11/19/73	Record on appeal in one volume, transcripts of proceedings in four volumes, and exhibits in one envelope mailed to Judge Boreman.
7/ 2/74	Opinion filed. (HSB) JBC dissenting. (vsl)
7/ 2/74	Opinion mailed to counsel of record and the Clerk of the District Court at Baltimore, Maryland. (vsl)
7/ 2/74	Judgment of the District Court reversed; case remanded for a new trial. Judgment filed. (vsl)
7/ 8/74	Record on appeal in above received from Judge Boreman. dhb
7/23/74	Certified copy of the judgment and printed copy of the opinion transmitted to the Clerk of the District Court at Baltimore, Maryland.
7/23/74	Appellee's motion to stay mandate for 30 days pending application for certiorari filed. (foc)

DATE	FILINGS—PROCEEDINGS
7/23/74	Order granting appellee's motion to stay mandate for 30 days pending application for certiorari filed. (foc)
7/23/74	Copy of order to stay mandate for 30 days pending application for certiorari transmitted to Judges Boreman, Craven and Field. (foc)
9/ 9/74	Notice evidencing the filing petition for writ of certiorari in the Supreme Court September 6, 1974 filed. (No. 74-215) (Layne)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 73-0129

(Violation of Food, Drug and Cosmetic Act,
21 U.S.C. §§ 331 & 333)

UNITED STATES OF AMERICA

v.

ACME MARKETS, INC., a corporation;
and JOHN R. PARK, an individual

The United States Attorney for the District of Maryland charges:

That Acme Markets, Inc., a corporation, organized and existing under the laws of the State of Delaware, and trading and doing business at 2120 West Lafayette Avenue, Baltimore, Maryland, and John R. Park, an individual, at the time hereinafter mentioned President of said corporation, the defendants herein, did, within the District of Maryland, on or about August 5, 1971, receive a number of boxes of gelatin dessert, a food, which said food had been shipped in interstate commerce from Newark, Delaware.

That thereafter, within the period from on or about August 5, 1971, to on or about November 30, 1971, and while said food was being held for sale after shipment in interstate commerce as aforesaid, the said defendants did, at Baltimore, Maryland, within the District of Maryland,

cause a number of boxes of said food to be held in a building that was accessible to rodents, and did cause said food to be exposed to contamination by rodents.

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid resulted in said food being adulterated within the meaning of 21 U.S.C. § 342(a)(3), in that it consisted in part of a filthy substance by reason of the presence in said food of rodent pellets, rodent hairs, and by reason of being rodent gnawed;

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. § 342(a)(4) in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, was an act caused to be done by said defendants, while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated as aforesaid in violation of Title 21 U.S.C. § 331(k).

21 U.S.C. § 331

COUNT II

The United States Attorney for the District of Maryland further charges:

That Acme Markets, Inc., a corporation, organized and existing under the laws of the State of Delaware, and trading and doing business at 2120 West Lafayette Avenue, Baltimore, Maryland, and John R. Park, an individual, at the time hereinafter mentioned President of said corporation, the defendants herein, did, within the District of Maryland, on or about November 3, 1971, receive a number of bags of flour, a food, which said food had been shipped in interstate commerce from Buffalo, New York.

That, thereafter, within the period from on or about November 3, 1971, to on or about December 1, 1971, and

while said food was being held for sale after shipment in interstate commerce as aforesaid, the said defendants did, at Baltimore, Maryland, within the District of Maryland, cause a number of bags of said food to be held in a ing that was accessible to rodents, and did cause said food to be exposed to contamination by rodents.

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. § 342(a)(3), in that it consisted in part of a filthy substance by reason of the presence in said food of rodent pellets, and by reason of being rodent gnawed;

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. § 342(a)(4) in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid was an act caused to be done by said defendants, while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated as aforesaid in violation of Title 21 U.S.C. § 331(k).

21 U.S.C. § 331

COUNT III

The United States Attorney for the District of Maryland further charges:

That Acme Markets, Inc., a corporation, organized and existing under the laws of the State of Delaware, and trading and doing business at 2120 West Lafayette Avenue, Baltimore, Maryland, and John R. Park, an individual, at the time hereinafter mentioned President of said corporation, the defendants herein, did, within the District of Maryland, on or about November 4, 1971, receive a number of bags of flour, a food, which said food

had been shipped in interstate commerce from Buffalo, New York.

That thereafter, within the period from on or about November 4, 1971, to on or about December 1, 1971, and while said food was being held for sale after shipment in interstate commerce as aforesaid, the said defendants did, at Baltimore, Maryland, within the District of Maryland, cause a number of bags of said food to be held in a building that was accessible to rodents, and did cause said food to be exposed to contamination by rodents.

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being adultered within the meaning of 21 U.S.C. § 342(a)(3), in that it consisted in part of a filthy substance by reason of the presence in said food of rodent pellets, rodent hairs, rodent nesting materials, and by reason of being rodent gnawed;

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. § 342(a)(4) in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, was an act caused to be done by said defendants, while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated as aforesaid in violation of Title 21 U.S.C. § 331(k).

21 U.S.C. § 331

COUNT IV

The United States Attorney for the District of Maryland further charges:

That Acme Markets, Inc., a corporation, organized and existing under the laws of the State of Delaware, and trading and doing business at 2120 West Lafayette Avenue, Baltimore, Maryland, and John R. Park, an individual, at the time hereinafter mentioned President of said

corporation, the defendants herein, did, within the District of Maryland, on or about November 5, 1971, receive a number of bags of flour, a food, which said food had been shipped in interstate commerce from Lincoln, Nebraska.

That thereafter, within the period from on or about November 5, 1971, to on or about December 2, 1971, and while said food was being held for sale after shipment in interstate commerce as aforesaid, the said defendants did, at Baltimore, Maryland, within the District of Maryland, cause a number of bags of said food to be held in a building that was accessible to rodents, and did cause said food to be exposed to contamination by rodents.

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. §342(a)(3), in that it consisted in part of a filthy substance by reason of the presence in said food of rodent pellets, and by reason of being rodent gnawed;

That said act of causing of said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. § 342(a)(4) in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, was an act caused to be done by said defendants, while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated as aforesaid in violation of Title 21 U.S.C. § 331(k).

21 U.S.C. § 331

COUNT V

The United States Attorney for the District of Maryland further charges:

That Acme Markets, Inc., a corporation, organized and existing under the laws of the State of Delaware, and

trading and doing business at 2120 West Lafayette Avenue, Baltimore, Maryland, and John R. Park, an individual, at the time hereinafter mentioned President of said corporation, the defendants herein, did, within the District of Maryland, on or about January 11, 1972, receive a number of bags of flour, a food, which said food had been shipped in interstate commerce from Buffalo, New York.

That thereafter, within the period from on or about January 11, 1972, to on or about March 14, 1972, and while said food was being held for sale after shipment in interstate commerce as aforesaid, the said defendants did, at Baltimore, Maryland, within the District of Maryland, cause a number of bags of said food to be held in a building that was accessible to rodents, and did cause said food to be exposed to contamination by rodents.

That said act of causing of said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. § 342(a)(3), in that it consisted in part of a filthy substance by reason of being rodent gnawed;

That said act of causing of said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. § 342(a)(4) in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building as aforesaid and to be exposed to contamination as aforesaid, was an act caused to be done by said defendants, while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated as aforesaid in violation of Title 21 U.S.C. § 331(k).

21 U.S.C. § 331

GEORGE BEALL
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 73-0129

UNITED STATES OF AMERICA

v.

ACME MARKETS, INC., a corporation;
and JOHN R. PARK, an individual

MOTION FOR BILL OF PARTICULARS

The Defendant, John R. Park, moves for a Bill of Particulars of the Information in the above case, as follows:

As to Count I

1. Is it intended to be alleged that the Defendant personally received the gelatin desert mentioned in Count I of the Information?
2. If not, in exactly what manner did this Defendant participate in the receipt of said gelatin desert?
3. Is it intended to be alleged that this Defendant personally caused a number of boxes of said gelatin desert to be held in a building that was accessible to rodents?
4. If not, in exactly what manner did this Defendant cause the said boxes of said gelatin desert to be held in a building that was accessible to rodents?
5. Is it intended to be alleged that this Defendant personally caused said gelatin desert to be exposed to contamination by rodents?
6. If not, in exactly what manner did this Defendant cause said food to be exposed to contamination by rodents?

As to Count II

7. Is it intended to be alleged that this Defendant personally received the number of bags of flour mentioned in Count II of the Information?
8. If not, exactly what manner did this Defendant participate in the receipt of said bags of flour?
9. Is it intended to be alleged that this Defendant personally caused a number of bags of flour to be held in a building that was accessible to rodents?
10. If not, in exactly what manner did this Defendant cause the said bags of flour to be held in a building that was accessible to rodents?
11. Is it intended to be alleged that this Defendant personally caused said bags of flour to be exposed to contamination by rodents?
12. If not, in exactly what manner did this Defendant cause said bags of flour to be exposed to contamination by rodents?

As to Count III

13. Is it intended to be alleged that this Defendant personally received the number of bags of flour mentioned in Count III of the Information?
14. If not, in exactly what manner did this Defendant participate in the receipt of said bags of flour?
15. Is it intended to be alleged that this Defendant personally caused a number of bags of flour to be held in a building that was accessible to rodents?
16. If not, in exactly what manner did this Defendant cause the said bags of flour to be held in a building that was accessible to rodents?
17. Is it intended to be alleged that this Defendant personally caused said bags of flour to be exposed to contamination by rodents?
18. If not, in exactly what manner did this Defendant cause said bags of flour to be exposed to contamination by rodents?

As to Count IV

19. Is it intended to be alleged that this Defendant personally received the number of bags of flour mentioned in Count IV of the Information?

20. If not, in exactly what manner did this Defendant participate in the receipt of said bags of flour?

21. Is it intended to be alleged that this Defendant personally caused a number of bags of flour to be held in a building that was accessible to rodents?

22. If not, in exactly what manner did this Defendant cause the said bags of flour to be held in a building that was accessible to rodents?

23. Is it intended to be alleged that this Defendant personally caused said bags of flour to be exposed to contamination by rodents?

24. If not, in exactly what manner did this Defendant cause said bags of flour to be exposed to contamination by rodents?

As to Count V

25. Is it intended to be alleged that this Defendant personally received the number of bags of flour mentioned in Count V of the Information?

26. If not, in exactly what manner did this Defendant participate in the receipt of said bags of flour.

27. Is it intended to be alleged that this Defendant personally caused a number of bags of flour to be held in a building that was accessible to rodents?

28. If not, in exactly what manner did this Defendant cause the said bags of flour to be held in a building that was accessible to rodents?

29. Is it intended to be alleged that this Defendant personally caused said bags of flour to be exposed to contamination by rodents?

30. If not, in exactly what manner did this Defendant cause said bags of flour to be exposed to contamination by rodents?

/s/

/s/

/s/

Attorneys for Defendant,
John R. Park

I HEREBY CERTIFY that the within Motion for Bill of Particulars was served upon the United States of America by mailing a copy thereof to Hon. George Beall, United States Attorney for the District of Maryland, to the attention of Leonard M. Linton, Jr., Esq., Assistant United States Attorney, Post Office Building, Baltimore, Maryland 21202, this 6th day of April, 1973.

/s/

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. 73-0129

UNITED STATES OF AMERICA

v.

ACME MARKETS, INC., a corporation;
and JOHN R. PARK, an individual

ANSWER TO MOTION FOR BILL OF PARTICULARS

The Government opposes the motion for a bill of particulars as follows:

1. The request for a bill of particulars by the defendant is an attempt by the defendant to compel the disclosure of the Government's evidence in advance of trial or, alternatively, to inquire into the Government's legal theory of the case in advance of trial. A bill of particulars is not a device by which the defendant may compel disclosure of the Government's evidence in advance of trial. *See* United States v. Crisona, 271 F.Supp. 150 (S.D.N.Y. 1967), *aff'd.*, 416 F.2d 107 (2nd Cir. 1969). Similarly, inquiry into the Government's legal theory is not a proper purpose for a bill of particulars. *See* United States v. Verra, 203 F.Supp. 87, 92 (S.D.N.Y. 1962).

2. As a matter of discovery and not as a matter subject to particularization, the Government is willing to disclose that its evidence will not show that the defendant personally performed the acts of receiving the foods described in the various counts of the indictment of causing them to be held in a building that was accessible to

rodents and of causing them to be exposed to contamination by rodents. The Government's evidence will simply show that the defendant was a corporate officer who, under law, bore a relationship to the receipt and storage of the food which would subject him to criminal liability under *United States* v. *Dotterweich*, 320 U.S. 277 (1943).

/s/ George Beall
United States Attorney

/s/ Leonard M. Linton, Jr.
Assistant United States Attorney

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Title omitted in printing]

TRANSCRIPT OF PROCEEDINGS HELD BEFORE
THE HONORABLE JOSEPH H. YOUNG
ON MAY 9 AND MAY 10, 1973

* * * *

(2) [The Court] First, I would advise you that this is a criminal case that comes before you by reason of an Information. It is a five count Information filed in March of this year, charging the Defendants, Acme Markets, Inc. and John R. Park, president and chief executive officer (3) of Acme Markets, Inc., with violations of certain provisions of the Federal Food, Drug and Cosmetic Act.

The Defendants are charged with violation of Title 21 of the United States Code, Section 331, and the provison thereof, for having caused certain lots of food to become adulterated by holding it in a building where it could be exposed or contaminated while being held for sale after shipment in interstate commerce.

I have read this to you, so the questions I ask of you will have some more meaning for you.

The Defendant, the corporation, as well as the individual, have filed a plea of not guilty to the Information and, therefore, raise issues of facts to be tried by a jury.

* * * *

(4) First, as indicated, the Defendants are Acme Markets, Inc., and John R. Park, who is an officer of that organization. Is Mr. Park in the courtroom?

* * * *

(16) Also, in the voir dire proceedings, I indicated to the panel that the case was against Acme Markets, Inc. and John R. Park, individually. Following this conference at the bench, I will advise the jury that I misspoke the title of the case. The case is actually a proceeding against

John R. Park, as an individual, as president of Acme Markets, Inc.

Further, I think, Mr. Pierson, you have something (17) you want to put on the record, is that correct?

(Mr. Pierson) In view of the fact that Acme Market is pleading guilty, we object to the introduction of any factual evidence, particularly relating to the substance of the offenses, unless the Government says that it can and does, in point of fact, follow this up by evidence which would link Mr. Park with the commission of these offense indirectly.

(The Court) Any comments, Mr. Linton?

(Mr. Linton) Yes, Your Honor. I am not sure what he means by "indirectly." It seems to me that is the whole question in this case.

(The Court) I am not sure what he means by it. Obviously, I will have to handle it as it comes up.

You are giving this caveat to the Government? You are going to object to certain testimony if it is introduced?

(Mr. Pierson) I don't want to object to each thing, each picture and the description.

(The Court) You want to enter an objection now to be a standing objection to any testimony by way of—

(Mr. Pierson) If you take it, it should be subject to the exception, subject to follow-up.

(The Court) I will grant you the right to have a standing objection without standing up and raising it (18) each time; however, I am going to allow it to come in, subject, of course, to your exception and not necessarily to the follow-up by the Government. I will have to rule on that when the time comes, because I am not at all sure that it is necessary.

You have your objection, Mr. Pierson.

* * * *

(19) (The Court) Members of the panel, in giving you the cases and the parties, I misspoke the parties who are involved. The case is actually going to trial only as to

the Defendant, John R. Park, who is an officer of Acme Markets, Inc.

Very well.

* * * *

(30) [Mr. Linton] Finally, the Government will establish that Mr. John R. Park, the Defendant on trial here, is the president of Acme Foods. That after this rodent condition was permitted to exist, Mr. John R. Park was told that this condition existed. An inspector of the Food and Drug (31) Administration who visited the warehouse left a list of observations with his employees in the warehouse, but beyond that, he left the general list of the observations and findings he made in the course of the inspection. Mr. John R. Park personally had a letter telling him of these problems. But, then, in spite of that letter, in January of 1972, in March of 1972, again, the Food and Drug Administration inspector goes to the Acme warehouse at 2120 West Lafayette Avenue and, again, having warned the employees of the plant as to what the conditions were that existed, Mr. Park having been told of the conditions that existed in the warehouse in January, in March of 1972, again, the inspector finds not only rodent contamination, but, again, an instance of rodents gnawing into consumer packages within the warehouse. That is in March.

* * * *

(33) Then, we will put on evidence to show that in January of 1971, Mr. John R. Park, president of the corporation, was mailed a letter telling him of this problem, that he responded to the letter, and that as of March of 1971, the conditions persisted.

* * * *

(38) THEREUPON—

GORDEN K. BROWN,

was called as a witness for and on behalf of the Government, and, having been first duly sworn, testified as follows:

* * * *

(40) DIRECT EXAMINATION

By Mr. Linton:

* * * *

Q. On November 29th, December 3rd, December 6th through 10th, December 13th, and December 14th, did you, in the course of your duties, inspect the Acme Markets, Incorporated warehouse, located at 2120 West Lafayette Avenue in Baltimore, Maryland? A. Yes, I did.

Q. Was there any other person present with you at the time of that inspection? A. Yes, Inspector James Merrick.

Q. Would you please tell us what took place upon your arrival at the Acme Markets on November 29th, sir? A. We stopped at the guard house on the front of the building and then were directed to Mr. William Scarzinski, supervisor in the warehouse.

Q. After introducing yourself, what did you do? A. We issued a notice of inspection and identified ourselves and told Mr. Scarzinski we went there to make an inspection and we proceeded to inspect the warehouse.

Q. Would you describe the warehouse complex, if you please, sir? (41) A. It is a rather large complex involving an older building, adjoined by a newer building and a smaller building across the alley. The older building is three stories high with a basement. On one end, there is a five-story bakery, also owned by the firm. At the other end is a large, one-story newer building, and at the back, on the back side of both the older section and the newer section are railroad sidings, and on the front side there is a loading area dock for trucks. Across from this same loading area is a smaller, older building.

Q. How long did your inspection last in November and December? A. Twelve days.

Q. Did you make a report of that inspection, sir? A. Yes, I did.

Q. When did you make that report, sir? A. Immediately following the completion of the inspection.

Q. Was it delivered to anyone, sir? A. It was turned into our supervisor at our district office.

Q. And was a report of what you found given to any employees of Acme? A. Yes, we issued a list of observations at the completion of the inspection.

(42) Q. What is a list of observations, sir? A. This is a list of the objectionable conditions encountered during the inspections, which we are required to issue at the completion of the inspection. This is a requirement of the Food, Drug and Cosmetic Act.

Q. To whom was it delivered, sir? A. It was delivered to Mr. Zahn.

Q. Who is Mr. Zahn, sir? A. He is the manager of the warehouse that we were inspecting.

Q. Now, I show you a document and ask you if you can recognize it, sir? A. Yes, sir, I do.

Q. What is it, sir? A. It is a list of the observations we issued to Mr. Zahn.

Q. How do you recognize it, sir? A. Well, it has my name on the bottom of it. I signed my name and it has the name of the firm, the date, and has Mr. Zahn's name and title at the top.

Q. What do you put in a list of observations, sir? A. We put in the observations of things we see during the inspection which are considered to be, based on our experience, objectionable and also objectionable in the (43) standpoint that they may involve a violation of the Food, Drug and Cosmetic Act or the products stored therein have been held under unsanitary conditions.

Q. Your report is then broken down to the various sections of the observations of the warehouse, is that correct? A. Yes.

Q. What, in the course of your inspections, did you observe in the section which is described as the basement? A. We found extensive evidence of rodent infestation in the form of rat and mouse pellets throughout the entire perimeter area and along the wall.

We also found that the doors leading to the basement area from the rail siding had openings at the bottom or openings beneath part of the door that came down at the bottom large enough to admit rodent entry. There were

also roden pellets found on a number of different packages of boxes of various items stored in the basement, and looking at this document, I see there were also broken windows along the rail siding.

Q. You say the document serves to refresh your recollection? A. Yes.

Q. Of those items? (44) A. Yes.

Q. Continue. A. There was rodent nesting material found in and around boxes of paper bags. There are a number of other specific items listed here—altogether twelve items listed in the basement.

* * * *

(47) Q. I show you Government's Exhibits (G) and (H), which is a notation listed under the pallet board which is not rodent-proof, and the pallet board against the door, which is not rodent-proof. The photograph portrays a forklift pallet laying against the side of the warehouse.

What is not rodent-proof about that, sir? A. The rail siding, where this pallet board is located, is badly littered with trash and debris and the pallet board leans up against the wall built between the ground level where the railroad tracks are and almost up to the edge of the door in the basement. The door, in turn, then, has an opening beneath it large enough to admit rodents.

Q. What does the pallet serve to do? What is the significance of the pallet? A. It gives a stairway or a ladder, if you will, up to the ledge where the rodents could enter the building.

Q. It gives who a stairway, sir? (48) A. The rodents.

* * * *

Q. I hand you Government's Exhibit No. 4 and ask you to review the portion which refers to the "first floor, old building," and relate generally what your investigation of the first floor of the old building revealed, sir. A. There are five items listed on here. The first one includes "Liquid Plumber," which is a drainage cleaner and was stored on the ledge in the hanging meat room near a cooked ham.

Q. What is the significance of "Liquid Plumber" drainage cleaner? A. It would be a hazardous type of material to be around a food product.

Q. Why so? A. Where it might fall on the product and contaminate (49) it with a harmful material.

Q. What other observations did you make, sir? A. Thirty mouse pellets on the floor along walls and on the ledge in the hanging meat room. There were at least twenty mouse pellets beside bales of lime Jello and one of the bales had a chewed rodent hole in the product. We also saw two hundred mouse pellets in the perimeter area of the Jello storage area. There were several hundred rat and mouse pellets along walls and in corners and on pallets of wild bird food.

* * * *

(66) Q. Besides what you have described there, what else did you observe in the course of your first inspection of November and December of 1971, sir? A. Well, there was extensive rodent evidence throughout the first floor area and there were rodent entry openings around many of the doors. The warehouse itself was extremely overcrowded. There were indications of improper or inadequate stock rotations where we found fresh merchandise stacked in front of older lots. The firm marks the lots as they are received with a sticker with a date on it, and we found in some cases that there were lots (67) that were several months old in the back with fresh merchandise stacked in front. This would indicate inadequate rotation of stock. There were—

(Mr. Pierson) Objected to and move to strike.

(The Court) Motion granted. The jury will disregard the last testimony of the witness.

By Mr. Linton:

Q. What is the significance of the stock rotation and sanitation, sir?

(Mr. Pierson) Objected to.

(The Court) Sustained.

(Mr. Linton) May I be heard and place my position on the record, Your Honor?

(The Court) You may at a later time.

(Mr. Linton) Beg your pardon?

(The Court) You may at the proper time.

(Mr. Linton) Thank you, Your Honor.

* * * *

Q. Did there come a subsequent time when you returned to the Acme warehouse? A. Yes, I did.

(68) Q. When was that, sir? A. In March of 1972.

Q. Mr. Brown, I show you a document and ask you whether you can recognize it, sir? A. Yes, I do.

Q. What is it? A. It is a list of observations which I issued to Mr. Zahn at the completion of the second inspection in March.

* * * *

(70) Q. What did you observe in the course of your second inspection, sir? A. We found that there had been a great deal of effort made in the way of cleaning up the warehouse, reducing the total inventory and in rodent-proofing measures. We also found there was still evidence of rodent activity in the building and in the warehouses and we found some rodent-contaminated lots of food items.

* * * *

(77) Q. After you had given your list of observations to Mr. Zahn in March of 1972—and to whom did you give them in November or December of 1971? A. It was issued to Mr. Zahn on both inspections in the presence of other gentlemen.

Q. Besides simply issuing them the list of observations, did you do anything else with respect to (78) management? A. Which inspection are you referring to, or are you referring to both of them?

Q. Either or both. A. Of course, we discussed the items listed in great detail and they were warned about the significance of the objectionable conditions and told that some of the things that would be needed to correct the situation, such as rodent-proofing measures and reducing the amount of the stock that was causing the overcrowded condition, and of course, bringing to their attention the fact that the spilled food items and the trash,

and such, provides rodent harbingers and attract rodents and make a place for them to live.

Q. Were these discussed with anyone besides Mr. Zahn? A. Yes, they were.

Q. With whom else? A. With Mr. McCahan, the local manager of the entire Acme operation here in this area.

Q. How do you spell his last name, sir? A. I think it is capital M-c capital C-a-h-a-n, I believe.

Q. Who is he, sir? A. He is the vice-president in charge of the (79) district office of the company.

Q. Anyone else, sir? A. Yes, Mr. William Bronsdon, the head sanitation engineer from the firm's Philadelphia office was present. Mr. William Scarzinski was present during the—I beleive he was present during the first discussion, either during the inspection and possibly at the final discussion. There were several other gentlemen present during these discussions.

Q. Do you know their names, sir? A. Mr. Thomas Alwein, who was present during part of these discussions.

Q. Do you know what his job is, sir? A. After the first inspection, he was appointed as a sanitarian in the warehouse under the direction of Mr. Zahn.

Q. Anyone else you recall being present? A. Well, there were other people present during parts of the inspections. I don't have anything before me which would show who all was present at which particular time.

Q. Do you recall any of those people, in particular, any names of any of those people? A. Mr. Zahn, the warehouse manager, which was the man I was issuing the paper to, was present at both times. (80) There was also a Mr. Hugo Hinckel and Mr. Tom Kelly present during parts of both of those inspections.

Q. Who are they, sir? A. They are also sanitation people working under Mr. Bronsdon.

Q. Do you recall any other corporate employees or officers being present, either at the conference following the submission of the list of the observations, or during any of the inspections? A. There was a Mr. St. John,

a vice-president in charge of warehousing was down, I believe, during the first inspection.

Q. When you say you believe he was there, do you recall, sir? A. He was there part of one day, as I recall, on the first inspection, the November and December inspections.

(The Court) Anything else, Mr. Linton?

(Mr. Linton) I don't believe so. If I may just have a second, Your Honor.

By Mr. Linton:

Q. In addition to discussing the conditions that you found in the warehouse, did you offer them any assistance, sir, or give them any advice? A. Well, during the inspection when the objectionable conditions were encountered, of course they (81) were pointed out to whichever of these gentlemen happened to be accompanying me at the time and also during the first inspection, I provided them with copies of a pamphlet, which is prepared by the Food and Drug Administration, on good principles of food sanitation. As I recall, I also provided them with copies of the Food and Drug Administration Act, and also in the discussions that would develop, some of the measures that needed to be taken to correct the situation were discussed at considerable length throughout both inspections.

Q. Was a pamphlet given on the first occasion, during the first inspection? A. Yes.

Q. On both the first and second? A. Yes.

Q. Was a copy of the law given to them during the first inspection as well? A. Yes.

* * * *

(82) CROSS EXAMINATION

By Mr. Pierson:

Q. This is a rather large warehouse, isn't it? A. Yes, it is.

Q. Would you say 250,000 square feet would be a fair estimate? A. I believe it is a little larger.

Q. It took you twelve days to make your full examination? A. That is right.

Q. And in the course of this examination, there (83) were some items, I assume, that you found on the second go-around in March that you did not notice on the first inspection—for example, the rusted door where a rodent could get in? You didn't remark on that in your first inspection, did you? A. No, I didn't. The interior was blocking it.

Q. It was there, though wasn't it? A. Yes, presumably.

Q. But you didn't notice it the first time? A. No.

Q. But you remarked on it the second time, did you not? A. That is right.

* * * *

Q. Now, in your meetings with people in this warehouse, did you run into someone by the name of Laucht? A. Yes, I did.

Q. He was the manager in charge of sanitation for the Baltimore area, do you recall that? If you don't know, just say so. A. Yes, I recall that he was introduced as that earlier.

Q. Then there was a warehousing manager, Mr. Zahn? (84) A. Do you mean was he present?

Q. At that time, the warehousing manager was Mr. Zahn, is that correct? A. Yes.

Q. And you also had dealings with Mr. McCahan, who was the head of the Baltimore district? A. That is correct.

Q. This facility, this warehouse, as far as you know, is the only Acme warehouse in the Baltimore district, is that correct? A. To the best of my knowledge, yes.

Q. Do you know approximately how many stores Acme had in this district at that time? A. Just from information supplied by members—

Q. It was over a hundred, wasn't it? A. I believe that is correct, yes.

Q. Right, and then isn't it a fact that on the first occasion that you met Mr. Bronsdon, isn't it a fact that he came in while the inspection was going on? A. Mr.

Brondson, to the best of memory, came in on the second day of the first inspection and was only on hand the last day during the final discussions on the second inspection, if my memory serves me correctly.

Q. But he was there during part of the first inspection? (85) A. Most of it.

Q. Apparently he had been alerted by somebody that this was going on and came down. A. That is correct.

Q. From their headquarters in Philadelphia? A. That is correct.

Q. And his job, if you know, was head of sanitation for the whole Acme chain, isn't that right? A. That is what I was informed, yes.

Q. In that job, he had certain assistants, but mainly, he was responsible for the sanitation in the chain. Is that what he told you? A. What?

Q. What impression did you get? A. My impression was he was responsible for inspecting for sanitation.

Q. In other words, the sanitation which should have been done by the people in Baltimore, but it was his job to go around and see it was done, in a sense, like yourself, but on the side of the company. A. I would say—all I know about it, as far as his responsibilities were concerned, is that he was making inspections again similar to ours for sanitation purposes.

Q. And he participated, in a sense, of being there almost all of the first inspection? (86) A. That is correct.

Q. And learned what you felt had to be done. You discussed this, did you? A. We discussed it thoroughly, yes.

Q. They didn't make any effort to keep you from making the inspection, did they? A. No, none whatsoever.

Q. Would it be fair to say that they cooperated with you very fully, as far as you making your inspection? A. That is correct.

* * * *

Q. And isn't it a fact, Mr. Brown, that in every instance where you pointed out rodent infestation or pos-

sible rodent infestation or broken bags or rodent urine or pellets, that all of that material was destroyed voluntarily by Acme? A. Yes, that is correct.

Q. How was that done? A. That was done under our supervision.

Q. Under the supervision of the Food and Drug (87) Administration? A. The Food and Drug Administration by hauling it to the dump and burying it.

Q. They did that voluntarily, didn't they? A. That is correct.

* * * *

Q. Isn't it a fact that in many instances, there might only be one bag which was subject to rodent (88) contamination or exposed to it and, yet, the whole bale was destroyed? Isn't that right? A. That is essentially correct. The pellets would be on the interior.

Q. There was no effort to open this bale and to see if we had ten good ones and ten bad ones? The whole twenty would have to go? A. Right.

Q. And it is also true, is it not, that that didn't only apply to the bales. They destroyed not only the one bale, but every bale that was on a particular pallet where rodent infestation manifested itself? A. With a few exceptions, yet.

Q. So a great deal of material was destroyed which might possibly have been salvaged? A. That is correct.

* * * *

(90) Did you make any effort to add up the figures to see how much food was destroyed? A. I believe the figure, totaling all lots destroyed on the first inspection, was approximately 153,000 pounds. I don't know the value.

Q. Well, would the figure of $15,000 ring a bell with you?

* * * *

A. I think the figures on here were my figures.

* * * *

(91) Q. Getting back to something that you said late in your direct examination, while you were not satisfied with what had been done between the first and second

inspections, a great deal had been done, had it not? A. Yes, it had.

REDIRECT EXAMINATION

By Mr. Linton:

* * * *

(93) A. I didn't find any specific lots of food items that had been chewed into and defiled by rats. The defilement that I found and that I saw was confined to mouse infestation.

* * * *

(95) Q. Did Mr. Bronsdon ever indicate to you that he had authority to do any more than make inspections, sir? A. Other than making the inspections and making recommendations about what was needed to correct them, I don't recall that he did.

* * * *

RECROSS EXAMINATION

By Mr. Pierson:

Q. Mr. Brown, Mr. McCahan was the man in charge of the Baltimore district, isn't that right? A. He was identified as such.

Q. Wouldn't he be the man to whom Mr. Bronsdon would make his recommendations? A. If I recall correctly, Mr. Bronsdon told me that he made his recommendations, at times, to him, also to (96) Mr. Zahn and to his own immediate supervisor, whom I believe is Mr. Fahlhaber in the Philadelphia office.

* * * *

(112) THEREUPON—

NORMAN KRAMER,

was called as a witness for and on behalf of the Government, and, having been first duly sworn, testified as follows:

* * * *

DIRECT EXAMINATION

By Mr. Linton:

* * * *

(113) Q. Mr. Kramer, I hand you a letter and ask you whether you can recognize it, sir? A. Yes I do.

(114) Q. What is it, sir? A. This is what is commonly known as a regulatory letter.

Q. Commonly known to whom? A. In the Food and Drug Administration, principally.

Q. What is a regulatory letter? A. A regulatory letter is a letter which is issued, sent to a firm, which sets the administrative review or conclusions based upon some evidence at hand which needs some correction.

Q. Who makes the decision to write such letters, sir? A. I make that decision.

Q. Did you make that decision in this instance, sir? A. Yes, I did.

Q. It is a letter from whom to whom? A. This letter is addressed to John R. Park, president of Acme Markets, Incorporated, 124 North 15th Street, Philadelphia, Pennsylvania. It is signed by myself, Norman Kramer, Food and Drug Officer, Baltimore, Maryland.

Q. When is it dated? A. It is dated January 27th, 1972.

Q. Was that, in fact, the date that the letter was sent, sir? (115) A. Either on that date or about. I see by receipt, which is certified mail, it was mailed on the same date.

Q. You referred to a receipt for certified mail. To what are you referring? A. I am referring to the fact that this letter goes by certified mail, and I have before me a receipt for certified mail number 105337, and another card indicating instructions to delivery employee, which is a receipt on the other end acknowledging receipt of this letter.

(Mr. Pierson) By whom?

(The Court) Pardon?

(Mr. Linton) It speaks for itself, Your Honor. Mr. Pierson can get into by whom it was signed on cross examination.

(The Court) So, are you objecting?

(Mr. Pierson) He didn't finish. He says it is acknowledging receipt of the letter.

(The Witness) The signature of the addressee is Acme Markets, and I cannot read the name underneath it. It looks like William something or other, William Egoff. I don't recognize the name.

(Mr. Linton) I ask that the letter and the receipt for certified mail and instructions to the delivering employee be admitted as Government's Exhibit No. 23.

* * * *

(116) (The Witness) The purpose of this letter and this type of letter is to advise—

(The Court) No so much this type. This letter is what we are talking about.

(The Witness) I am sorry, Your Honor.

The purpose of sending this letter is to advise the corporate officials that we feel should be advised of a serious problem that we have encountered in one of their establishments, warehouse, factories, or what (117) have you; the purpose being to give them some opportunity to know of the administrative decision and to, hopefully, for the firm to take measures to correct the serious conditions that are set forth in the letter.

By Mr. Linton:

Q. Did you get a response from Mr. Park when you wrote the letter, sir? A. No, I didn't. From Mr. Park, no, I didn't.

Q. Did you get any response at all to your letter, sir? A. Yes, I did.

Q. In what form did that response come, sir? A. I received a letter from Mr. McCahan.

Q. I hand you a letter and ask you whether you recognize it, sir? A. Yes, I do.

Q. What is it, sir? A. This is a four-page letter in response to my letter of January 27th. This letter is

dated February 7th, 1972, and is signed by R. W. McCahan.

* * * *

(119) CROSS EXAMINATION

By Mr. Pierson:

* * * *

Q. Have you had any contact with Mr. McCahan?
(120) A. Yes, sir.

Q. And Mr. McCahan is the man in charge of the Baltimore district of Acme, or was? A. I think he had been introduced to me as a divisional head of Baltimore.

Q. As a matter of fact, in your original letter, you sent a copy to Mr. McCahan, didn't you? A. Yes, I did, for courtesy purposes and to let everybody know.

Q. He was directly in charge of the Baltimore operation, isn't that correct? That is why you wrote him, isn't it? A. Wrote to whom?

Q. Yes. A. I wrote to Mr. Park.

Q. That is why you wrote a copy to Mr. McCahan, isn't that right? A. Yes.

Q. You did that because you knew he was in charge of the Baltimore operation? A. I knew that he was, in part, in charge of the operation.

Q. What do you mean "in part?" A. That he was a division head.

Q. That he was a division head. (121) A. Yes.

Q. And that made him in charge of the Baltimore operation A. Right. I wasn't aware that he was in charge of all of the things that had to be pointed out, and I wanted to make certain that everyone was aware of the problems we encountered during these two inspections.

Q. And you didn't think that he was in charge of the sanitary measures or requirements? A. I really don't know exactly what you mean by "in charge." I think he was a divisional head.

Q. Right, and he had charge of the warehouse and the stores. You knew that, didn't you? A Right, yes.

Q. And as far as sanitation is concerned, you knew he was in charge of that, also, didn't you? A. Well, I knew he was an individual who had some responsibility in the area, but I wanted to be certain that the most responsible people in the corporation were aware of the problem which was, at that time, regarded as a very serious problem.

Q. Yes, but you knew that anything that was done in the Baltimore district would be done under Mr. McCahan's direction or supervision, didn't you? A. No, not completely so.

(122) Q. What did you think his job was? A. A division head of the Baltimore district office.

Q. What did that mean to you A. Well, it meant that someone had appointed him, delegated certain responsibilities involving the Baltimore warehouse.

Q. Overall responsibility. A. I didn't know exactly.

Q. But you knew that he was the head man of the Baltimore operation, didn't you? A. One of the head men of this operation.

Q. Give me the name of another one? A. Mr. Park. Mr. Park and Mr. Fahlhaber. There was a number of vice-presidents that I was told had different functions.

Q. Right, and you knew that Mr. McCahan's function was to run the Baltimore operation, didn't you? A. In part.

Q. Okay. What do you mean by "in part?" A. I don't know how much. I knew he was, in part, because in conversations with him and reviewing reports of the problem, it appeared to me that there were areas required of other people elsewhere, particularly in the Philadelphia office. I was given such names as Mr. Hammel, Mr. Fahlhaber, (123) and a few others, depending upon specific problems.

Q. Had you ever heard of Mr. Bronsdon? A. Yes, Mr. Bronsdon.

Q. And didn't you know that Mr. Bronsdon was directly in charge of sanitation for Acme? A. I knew he was very active in this field and was making inspections of all the warehouses in this part of the country, as I understand it, of course, for Acme Markets.

Q. So, essentially what he was doing for Acme was the same thing your agents were doing for you, isn't that right? A. I believe so.

(Mr. Pierson) No further questions.

(The Court) Anything else?

REDIRECT EXAMINATION

By Mr. Linton:

Q. Was there some question as to the extent of Mr. McCahan's authority when you wrote him that letter? A. I didn't write him that letter. I wrote the letter to Mr. Park, with a copy to Mr. McCahan.

Q. When you addressed that copy to Mr. McCahan, did you know the full extent of Mr. McCahan's authority? A. To Mr. McCahan's authority?

Q. Yes. A. I assessed in my own mind what his full authority (124) was.

Q. What was that assessment, sir? A. That he was head of this Baltimore section, which included the warehouse operation. As to what degree of responsibility he had, I wasn't certain.

* * * *

Thereupon—

ROBERT W. McCAHAN

was called as a witness for and on behalf of the Government, and, having been first duly sworn, testified as follows:

* * * *

DIRECT EXAMINATION

By Mr. Linton:

Q. Mr. McCahan, what is your job title and where are you employed, sir? A. My job title is Division Vice-President. I am employed by Acme Markets, and I am in charge of the Baltimore division for Acme Markets.

Q. Within the geographical area for which you are (125) responsible, is this warehouse located at 2120 West Lafayette, Baltimore, Maryland, within your district, sir? A. Yes, sir and it is in my responsibility.

Q. I show you a letter presently marked Government's Exhibit No. 24 and ask you whether you recognize the letter sir? A. Yes, I do.

Q. Did you write the letter, sir? A. Yes, I did.

Q. Did you write it on your own behalf or did you write it on behalf of someone else? A. I wrote it on behalf of the company and Mr. Park, as stated in the letter.

Q. Did he approve the letter before you mailed it, sir? A. That, I cannot tell. I worked through our general counsel, Mr. Gilfillan, on this.

* * * *

(127) CROSS EXAMINATION

By Mr. Pierson:

* * * *

Q. Now, at the time of the episode which is complained of in the Information, how many warehouses did Acme have in the Baltimore division? A. To the best of my knowledge, only one warehouse.

* * * *

A. Approximately one hundred and twenty or one hundred and twenty-five.

* * * *

(128) A. My duties and responsibilities encompassed responsibility for the operation of all the stores and warehouses and bakeries within the jurisdiction of division six within our company, which is the Baltimore division.

Q. Did you have any duties with reference to sanitation? A Yes, sir.

(129) Q. What were they? A. My duties with regard to sanitation would apply to, again, all of the facilities in the division, and it would be to keep the premises sanitary and clean and to operate within the law.

Q. What measures did you take? Did you have anybody working under you who has something to do with sanitation, directly? A. Yes, sir. At the time I took

the office as division manager, and ever since then, we have had a man whose prime responsibility is sanitation inspections and quality control in the division and he reports to me.

Q. He reports to you? A. Yes, sir.

Q. Now, in addition to this man, did you have any help? Did you employ any outside persons in connection with sanitation at the warehouse? A. Yes, sir.

Q. Whom? A. We employed—and don't hold me to this exactly—but I believe it was Hygienic Sanitation Company.

Q. In Baltimore? A. Yes, I believe.

Q. What were they supposed to do? (130) A. It was their role, as I understand it in their contract with our company, to keep all of our facilities free and clear of vermin and rodents.

Q. Were they under contract with you in November of '71 and March of '72 when the inspection was made by the Food and Drug Administration? A. To the best of my knowledge, they were, yes, sir.

Q. Were you present when the inspection took place? I am speaking of the first inspection A. No, sir, I was not.

Q. Do you know Mr. Bronsdon? A. Yes, I do.

Q. Was he with the company at that time? A. Yes, he was.

Q. What was his duty at that time or his responsibility? A. Mr. Bronsdon is sanitary inspection engineer. I hope I have got his title right. He is employed by our company and operates out of the corporate engineering department in Philadelphia, and it is his function to help the divisions and to oversee the sanitation programs in the divisions of the company, the various divisions of the company, this being only one.

Q. Is it his responsibility to make recommendations on what has to be done? (131) A. Yes, sir.

Q. Have you had any contact with Mr. Bronsdon in connection with these matters? A. Yes,sir, I have had considerable contact with Mr. Bronsdon, and we have taken immediate action on all of the recommendations.

* * * *

(132) Q. Did you know, in point of fact, that not enough had been done to satisfy the Food and Drug Administration—that is, after the first inspection? A. No, sir.

Q. When did you find that out? A. I became aware of that as the result of the second inspection.

Q. Which was in March of '72? A. Yes, sir.

Q. What did you do then? A. I made an all-out drive to marshal every force that was at my command to get in compliance immediately.

Q. Have they been back since, to your knowledge? A. To the best of my knowledge, there has been no inspection by the Food and Drug Administration of our warehouse since that day; however, I believe there had been Food and Drug Administration officials there from time to time, which is their normal course, to pick up samples of merchandise.

(133) Q. Now with respect to material that is contaminated, what is your policy? A. Our policy with regard to contaminated material is that it should be discarded and never placed in a position where it might even be remotely offered for sale.

* * * *

Do you have any standing instructions as to what is to be done with that material if it has been discovered to have been contaminated in some way? A. Yes, sir.

Q. What is that? A. It is to be destroyed.

Q. Is it destroyed at the store? A. It is destroyed at the store level, yes, sir.

* * * *

(134) Q. Who authorizes destruction? A. Our warehouse supervisors.

Q. Ultimately, who is the final authority in the Baltimore district? A. With regard to whether or not merchandise be destroyed?

Q. Right. Would he have ultimate authority there? A. He would have ultimate authority, I believe.

Q. You wouldn't be involved in that? A. If you mean, would he call me up or write me or ask me for permission to destroy a pallet of Gold Medal flour, or some-

thing like that, why, no. He would do that on his own authority.

Q. Did you or did you not make an effort to comply with the requirements of the Food and Drug Administration after the first inspection? A. We made a very strong and concerted effort to comply one hundred per cent with the rules and regulations, as set forth, and as we understood them from the Food and Drug Administration.

Q. How much did you spend, approximately? A. Including the aforementioned cost of merchandise, (135) which represented the initial amount of merchandise that was destroyed, I believe it was close to $70,000 or $69,000 and some cents.

This included the cost of new doors, rodent-proofing the building, the cost of brand new automatic sweeping equipment, the hiring of ten additional people whose duties were solely that of cleaning, and a supervisor to supervise them. Those are the things that stand out in my mind.

Q. Do you still have a sanitation man in your organization? A. Yes, sir.

Q. Is it still the same person? A. Yes, sir.

Q. Do or do you not still have an outside service? A. Yes, sir, we do.

Q. With whom do you deal? A. Now, there, you have got me, because we have changed. To the best of my knowledge, we have a new company which is doing the outside sanitation work for us, and I just can't remember the name of the company. I am sorry. I am sure Mr. Bronsdon would know.

* * * *

(136) REDIRECT EXAMINATION

By Mr. Linton:

* * * *

A. If I said that Mr. Bronsdon reports to me, I used the wrong phrase. He would report to me on things that relate to my division and would aid me in a staff capacity.

Q. Under whose authority did he act? A. He acted

under the authority of his superior at corporate headquarters, who is our vice-president of engineering, Mr. Albert Fahlhaber.

* * * *

(137) Q. And would reports that go to you go to Mr. Fahlhaber as well, sir? A. What kind of reports?

Q. Reports as to sanitary conditions or sanitation problems in the warehouses? A. I don't think so. I think that they would be more likely to go—for example, a report that would come to me, I would go to Mr. Bronsdon on it. I called Mr. Fahlhaber on this particular incident myself and brought his attention to it.

* * * *

Q. Could he have, on his own authority, destroyed 150,000 pounds of food, sir. A. At one fell swoop?

Q. At one fell swoop sir. (138) A. I think he would have contacted me before he did it.

* * * *

(139) Thereupon—

A. E. GILFILLAN

was called as a witness for an on behalf of the Government, and, having been first duly sworn according to law, was examined and testified as follows:

* * * *

(140) DIRECT EXAMINATION

By Mr. Linton:

* * * *

Q. What are the duties of the preseident of the (141) corporation, sir? A. We have a bylaw that describes or prescribes the duties of the chief executive officer of the company, and if you wish, I would be glad to read it to you.

Q. If you would, please, sir. A. Do you want to see it first?

Q. No, thank you. I assume it is all right. A. This is Bylaw number 29 and it is headed "The Chief Executive Officer of the Company: The Chairman of the board of directors or the president shall be the chief executive officer of the company as the board of directors may from time to time determine. He shall, subject to the board of directors, have general and active supervision of the affairs, business, offices and employees of the company. In the absence or inability to act, as chairman of the board, he shall preside over all meetings of the stockholders and of the board of directors and, by virtue of his office, shall be a member of all committees of the board of directors and of the company, except as otherwise specifically provided.

He shall, from time to time, in his discretion or at the order of the board, report the operations and affairs of the company. He shall also perform such other duties and have such other powers as may be assigned to him from time to time by the board of directors."

* * * *

(142) CROSS EXAMINATION

By Mr. Pierson:

* * * *

A. He functions by delegating the various activities of the corporation to those people who are in charge of it. If it is legal, it is delegated to me. If it is engineering, it is delegated to engineering. If it is real estate, it is delegated to real estate.

Q. How many employees does Acme Markets have? A. Approximately 36,000 employees.

Q. About how many stores does Acme have? A. Roughly, about a hundred stores, that includes stores on the West Coast of the subsidiary.

Q. Where are the locations of these stores, generally? A. The stores are located in New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, West Virginia, and California. Then we have a packing plant in Lincoln, Nebraska, and we have a carrier in Hurlock,

Maryland, and we have some other activities around the country.

(143) Q. In connection with sanitation, under whose heading would that come? A. That comes under the vice-president of engineering and that is Albert J. Fahlhaber.

Q. Does he do this himself? A. No, he has a sanitation committee, headed by Mr. Bronsdon—B-r-o-n-s-d-o-n.

Q. And what are Mr. Bronsdon's duties? A. He has charge of sanitation in the stores, the warehouses, and he is under Mr. Fahlhaber but working in conjunction with the various division vice presidents, since we have about, I think, six or seven divisions.

* * * *

REDIRECT EXAMINATION

By Mr. Linton:

* * * *

(144) Q. Does he delegate all his authority? A. He obviously retains certain things, which are the big, broad, principles of the operation of the company, and he has the responsibility of seeing that they all work together.

Q. Normal day-to-day activities are the responsibilities of these persons to whom he delegates them, right? A. That is right. The normal operating duties. It would be physically impossible for him.

Q. Was the rodent infestation problem of the scope that was involved in the warehouse in Baltimore a normal day-to-day activity? A. Food warehouses do have those problems—how much of a day-to-day thing they are, I don't know—but they are something that comes along, and normally would come under the jurisdiction of the department of engineering and sanitation department.

* * * *

(148) (Mr. Pierson) The Government having rested, first, we would move that the testimony admitted to exception be stricken as not having been followed up.

(The Court) Motion denied.

(Mr. Pierson Secondly, we move for a judgment or acquittal on the grounds that the evidence in chief has shown that Mr. Park is not personally concerned in this Food and Drug violation. The chain of command has been shown, and it is certainly obvious from Mr. McCahan's testimony where the responsibility lay for complying with the Food and Drug Act.

(The Court) Dotterweich still seems to be the last word in this area.

(Mr. Pierson) I beg your pardon, Your Honor?

(The Court) Dotterweich still seems to be the last word in this area. Whatever I might think of it, it has not been changed by Congressional action. I assume that the Congress had not acted, knowing the results of that case. It seems to me that case would be controlling here and says, in effect, the ultimate judgment should rest with the jury. So, I will hear you again at the conclusion of the evidence, but at this time, I will deny the motion.

* * * *

(153) THEREUPON—

JOHN R. PARK

was called as a witness for and on his own behalf, and, having been first duly sworn, testified as follows:

* * * *

DIRECT EXAMINATION

By Mr. Pierson:

* * * *

(154) Q. How long have you been with that company? A. Since 1939.

Q. What was your first job? A. My first job was a clerk in a retail grocery store.

(155) Q. For the same company? A. Yes, for the same company. Then, it was the American Stores Company.

Q. Have you been with them ever since? A. Yes, I have.

* * * *

Q. Have you ever been convicted of any crime? A. No, sir.

Q. Have you ever been accused of one that you know of? A. No, sir.

Q. Mr. Park, how many employees does Acme Markets have? A. Approximately 35,000.

Q. And all of these are, in a sense, under your general direction, is that correct? A. That is right.

Q. How do you function? In other words, how does this operate? You certainly don't go to every store and sell bags of tea or sugar or things like that. What is the setup? In other words, do you have subordinates who do certain work? (156) A. Yes.

Q. Would you tell the Court and jury just in a general way what kind of chain of command there is. A. We are organized in the organizational structure for responsibilities for certain functions and phases of our operations are assigned to individuals who, in turn, have staff and departments under them. We have two executive vice-presidents of the company.

Q. What do they do? A. One is executive vice-president for the administrative functions of the company. The other executive vice-president is responsible for the sales and operations of the company. This is our eastern operation. We also have a West Coast subsidiary company, which is a separate corporation, and the president of that company has his own organization, and he is responsible directly to me for his operation in the West.

Then, in addition to the executive vice-presidents, there are vice-presidents who have assigned departmental responsibilities. We have the geographic regions and areas, of which Baltimore is one.

Q. I want to interrupt you at that point.

How many stores did Acme have in November of 1971 and March of 1972, just in a very rough way? A. I'm afraid I couldn't answer that accurately. I (157) can tell you that now we have approximately a few less than nine

hundred total stores, and at that time, I would say we had more stores than that.

Q. How many warehouses do you have? A. I believe we have thirteen warehouses.

Q. Do you have one in each region? A. We have one in each region. In the Philadelphia region, for example, we have three grocery food warehouses. We also have a general merchandise warehouse and a drug warehouse.

Q. Was Baltimore one of the regions in March of '72? A. We call it "divisions," but it is a geographic region, yes, sir.

Q. Who was in charge of that and what was his title? A. Robert McCahan, and he was Division Six vice-president.

Q. How many stores did he have under his jurisdiction, if you know? A. I don't know exactly, but I believe it was in the neighborhood of a hundred and ten to a hundred and twenty at that time.

Q. Now, Mr. Park, with reference to sanitation, which is the issue here, what provision was made to your (158) knowledge, to have a person or persons take care of that phase of your business.

First, let me withdraw that and ask you this. Did this come under one of the executive vice-presidents and, if so, which one? A. What do you mean?

Q. Just sanitation. A. Sanitation, the technical aspects of sanitation does come under a vice-president in charge of engineering. This is the technical side of it, the inspection aspect of it.

Q. When you say inspection, what was the purpose of the inspection? A. The inspection's purpose would be to see that our standards of sanitation and cleanliness are being maintained in all of our operations.

Q. You mean in stores and warehouses? A. Stores and warehouses, plants, and so forth.

Q. In 1971, did you have any person who was under the executive vice-president for engineering who was personally responsible for sanitation from an inspection point of view? A. I may have misled you. The man in charge of engineering, the gentleman in charge of engineering, is a vice-president. He is not an executive

vice-president, and, (159) yes, sir, he did have a man under him, Mr. William Bronsdon, who is in charge of the sanitation technical aspect and inspection aspect of our sanitation program.

Q. How long has Mr. Bronsdon been with Acme? A. I believe he was employed in 1965.

Q. Do you know how many people he had under him, from the standpoint of his own staff. I am not talking about the local sanitation people. I am talking about Mr. Bronsdon's staff. A. I don't know precisely. I believe Mr. Fahlhaber, to whom Mr. Bronsdon reports, feels that he had an adequate staff to perform his functions. It was several people.

Q. It was more than one man? A. I am quite sure of that, yes, sir.

Q. Do you know anything about Bronsdon's qualifications? A. Yes, when he was employed, Mr. Fahlhaber felt that he had an excellent background in this field of food sanitation, that his experience was such that he was well-qualified. I know he has a degree. I believe he has a Bachelor of Science Degree, I think in the dairy field, and he was well-recognized as being knowledgeable and capable in this area.

Q. To your knowledge, did he have any contact in his (160) capacity—not in connection with Acme, but as a sanitation expert—with the Food and Drug Administration of the United States? A. It is my impression that he has been recognized with a high degree of competency by members of the Food and Drug Administration. I think he has participated in discussions and seminars at their request. That is my impression, that he is well regarded.

(Mr. Pierson) Let me have this marked for identification as Defendant's Exhibit 1 for identification.

(Thereupon, a Workshop Program on Warehouse Sanitation in conjunction with the State of New York was marked as Defendant's Exhibit No. 1 for identification.)

By Mr. Pierson:

Q. Now, I show you Defendant's Exhibit 1 for identification and ask you if you can tell us what that is. A. This is a Food and Drug Administration Workshop Program on Warehouse Sanitation conducted by the Food and Drug Administration in cooperation with the State of New York.

Q. Does it show whether Mr. Bronsdon participated in this? (161) A. Yes, on the program agenda, in one of the morning sessions, Mr. Bronsdon is shown as, I would imagine he was the speaker on the subject of inventory control. He is listed in the summary as one of the speakers, in addition to being on the program.

* * * *

(162) Q. To your knowledge, is he, or was he not regarded as being an expert in this field? A. It is my impression that he was very highly regarded, professionally, and still is.

Q. How did you regard him? A. I regarded him in the same manner.

Q. Now, how did you learn about the problem in the (163) Baltimore warehouse? I am assuming you did learn of it? A. Yes, I did, sir.

I learned of it through the letter that was referred to yesterday, addressed to me, calling my attention to the problem that existed.

Q. That was Dr. Kramer's letter? A. Dr. Kramer's letter. I believe it was dated approximately the 29th of January, or thereabouts.

(The Court) It is Government's Exhibit 23, is that right?

(The Clerk) Yes, Your Honor.

(The Witness) The letter came in, and a copy of that letter was addressed and sent to Bob McCahan, as the man in charge of this division, and the original of the letter showed that a copy of it went to Mr. McCahan. I believe Bob McCahan received his copy ahead of the receipt of the original in my office, and when Mr. McCahan received his copy, he immediately got in touch with Mr. Gilfillan, who is the vice-president for legal

matters of our company, and told Mr. Gilfillan this letter had been received in his office and was on its way to my office. I believe, if my recollection is correct, Mr. Gilfillan came into my office and asked my secretary to let him see the letter immediately upon its receipt, and I believe that Mr. Gilfillan read the letter and got in touch with Mr. (164) McCahan at once, told him we had received it, and came back to me and discussed the letter with me.

* * * *

A. He told me that he had discussed the matter with Mr. McCahan and that Mr. McCahan was investigating the situation immediately and would be taking corrective action and would be preparing a summary of the corrective action to reply to the letter.

Q. Was that your normal procedure, or do you have many of these things? A. Well, no, we don't have many of these things, but I would say that Mr. Gilfillan and I worked very closely. He is in my office several times a day, usually, and any correspondence that has any legal aspect or relates to Government matters, Mr. Gilfillan is usually in on it very promptly.

Q. Well, aside from what you did, or aside from what Mr. Gilfillan did for you, what could you have done? Is there anything you could have done? A. I don't believe there was anything I could have done more constructively than what I found was being done.

Q. And you were satisfied with what was being done? (165) A. Yes, sir.

Q. Now, there are other problems arising in connection with the activities of your company, are there not? A. Yes, sir.

Q. And in a general rule, are they handled in the same manner by reference to high-level subordinates? A. Yes, sir.

Q. Could you, yourself, as head of a company with 35,000 employees, do all of this stuff yourself? A. No, sir.

Q. What is your duty, in general? In other words, you come into the office in the morning. What do you do? Do you just sit down and smoke a pipe?

(The Court) He is not a lawyer, Mr. Pierson.
(Mr. Pierson) I beg your pardon, Your Honor?
(The Court) He is not a lawyer.

(Laughter.)

(The Witness) Well, my days aren't always as orderly as I would like. I am responsible for the overall operation of the company. I have, I believe, presently, approximately thirteen of our key executives that report to me directly. We have a general schedule of meetings where they bring me up to date on their activities and we discuss their affairs and their problems. This takes (166) up a good bit of time each week.

* * * *

A. Yes, it is my understanding that under each division vice-president, they have the responsibility for the overall sanitation maintenance assigned to an individual.

* * * *

(167) (The Witness) Who was responsible for the Baltimore divisions?
(Mr. Pierson) Yes.
(The Witness) Mr. McCahan.

By Mr. Pierson:

Q. Would that include sanitation? A. Yes, sir.
(Mr. Pierson) Your witness.

CROSS EXAMINATION

By Mr. Linton:

Q. In fact, overall, in the whole corporation, sanitation is included in your responsibility, isn't it, sir? A. I am responsible for the activities and the affairs of the whole company.

Q. Including sanitation, sir? A. I am responsible for the company's operation in its entirety.

Q. Including sanitation or not including sanitation? A. Including everything.

Q. Including sanitation or not including sanitation? A. I believe I would have to answer yes. I think that

that is a thing that I am responsible for in the entire operation of the company.

Q. Well, that is the kind of responsibility (168) that you normally assign to subordinates who you supervise, is that correct, sir? A. That, along with the many other phases of our company, I have to assign to dependable subordinates.

Q. And those subordinates include a Mr. Albert Fahlhaber, the vice-president for engineering? A. Yes, sir.

Q. They include a divisional vice-president, Mr. McCahan?

Q. Do they include a man by the name of of Mr. St. John? A. Yes.

Q. Who is Mr. St. John? A. Mr. St. John is our director of our distribution services.

Q. What does that mean? What is his job? A. Well, his job is primarily supervising the distribution centers in our Philadelphia division. That is his day-to-day primary responsibility. He also, from time to time, because of the breadth of that responsibility, is available to assist the other divisions in some of these distribution center matters.

Q. Like Mr. St. John came down to Baltimore during the inspection of the Baltimore warehouse, didn't he? A. I understand he did.

(169) Q. Who is Mr. Hammel? A. Mr. Hammel is the executive vice-president of sales and operations. He is the man to whom Mr. McCahan reports directly.

Q. And Mr. Bronsdon, as well, falls under Mr. Fahlhaber's supervision, but through Mr. Fahlhaber you direct Mr. Bronsdon as well, is that correct? A. Yes, sir.

Q. How many warehouses does Acme operate, sir? A. I think I was asked earlier, and without counting them, I think it is in the neighborhood of thirteen or fourteen.

Q. Are they all the same size? A. No, there is quite a variation in size and nature.

Q. There are about eight major ones, as I understand it? A. There would be eight grocery warehouses in the East. We also have two major grocery warehouses in California.

Q. And as of 1970, I think March of 1970, Mr. Fahlhaber was at that time your divisional vice-president? A. Mr. Fahlhaber is in charge of engineering.

Q. I am sorry. Vice-president in charge of engineering as of March of 1970? (170) A. Yes, he was.

Q. And Mr. Bronsdon was sanitation engineer under his direction in March of 1970, sir? A. Yes.

(Mr. Pierson) I think you mean March of 1972.

(Mr. Linton) No, I mean March of 1970.

By Mr. Linton:

Q. And Mr. St. John was in his capacity handling warehousing matters in 1970, sir? A. Yes, sir.

Q. And was Mr. Hammel executive vice-president in March of 1970? A. I am not sure. Mr. Hammel was made executive vice-president, and I do not believe he was executive vice-president in March of 1970.

Q. Among the warehouses you had as of March, 1970, were warehouses in Philadelphia, is that not right, sir? A. Yes, sir.

Q. Who was the division vice-president of the Philadelphia warehouses, sir?

(Mr. Pierson) Your Honor, I object to that.

(The Court) How is it relevant?

(Mr. Linton) Pardon?

(The Court) How is it relevant?

(171) (Mr. Linton) It is relevant because there is—

(Mr. Pierson) Wait a minute. My suggestion is that we approach the bench.

(The Court) All right.

(Thereupon, an off-the-record discussion was held at the bench, out of the presence and hearing of the jury.)

(Thereupon, the following proceedings were had in open court, in the presence and hearing of the jury.)

(The Court) Was there an objection on that?

(Mr. Pierson) Yes, sir.

(The Court) Overruled.

By Mr. Linton:

Q. Do you recall who was the divisional vice-president for whatever division included the Philadelphia warehouse?

(The Court) We are talking, again, Mr. Park, about 1970.

(The Witness) The gentleman who is responsible for the Philadelphia division, did you say, sir?

(Mr. Linton) Yes, sir.

(The Witness) In March of 1970, I believe it (172) was not designated as a vice-president at that time. This is to the best of recollection of the timing of this, but this was a gentleman named Phillip Helmsby.

By Mr. Linton:

Q. And that is someone other than Mr. Robert McCahan, who was divisional vice-president of division five as of November of '71? A. In Philadelphia?

Q. Yes, sir. A. You mean Mr. Helmsby was different from Mr. McCahan?

Q. Yes. A. Yes, they are two different people.

Q. And as of March—

(Mr. Pierson) Your Honor, my objection goes to the entire line.

(The Court) Overruled.

By Mr. Linton:

Q. And as of the inspection of March 23rd—

(Mr. Boyd) Mr. Pierson asked if the objection goes to the entire line, Your Honor.

(The Court) You may have your objection to the entire line, but it is the same ruling.

By Mr. Linton:

Q. As of March 23rd to March 26th of 1970 at your (173) warehouse at 59th and Upland Way in Philadelphia, Pennsylvania, there was a rodent infestation problem there at that warehouse at the same time, wasn't there, sir? A. I can't recall that specific incident. There could have been.

Q. Mr. Park, I show you a letter and ask you whether you recognize it, sir? A. Well, I am not positive that

I recognize it, but it is addressed to Acme Markets, and it is addressed to John Park's attention, John Park, president, and I would believe that I had seen this. It does look familiar, yes, sir.

Q. Would you read the letter, sir, and would you indicate whether or not you recall having received the letter and whether you are familiar with the contents of the letter, sir? A. You wish me to read the entire letter?

Q. To yourself, please.

(Thereupon, a letter was handed to the witness, and the witness complied with the instructions of counsel.)

(The Witness) This letter is dated April 24th, 1970, and I believe I did read that letter at that time.

(Mr. Linton) I would ask that letter be (174) admitted in evidence as Government's Exhibit 27.

(Thereupon, a letter dated April 24th, 1970 to John R. Park, was admitted in evidence as Government's Exhibit No. 27.)

By Mr. Linton:

Q. Mr. Park, the letter that you have indicated that you believe you did read, indicates certain objectionable conditions in the establishment at 59th and Upland Way in Philadelphia, Pennsylvania, and it lists them, is that correct, sir? A. Yes, sir.

Q. And the objectionable conditions are enumerated, and the first is, sir, potential rodent entryway noted by an ill fitting door and doors in ill repair in southwest corner of warehouse, at dock at old salvage room and at receiving and shipping doors, which were observed to be open most of the time. Number two, rodent nesting, rodent excreta pellets, rodent staining on bale bagging and rodent gnawed holes were noted among bales of flour stored in the warehouse. Number three, potential rodent harborage was noted in discarded paper and sawdust and other debris piled up in corner of shipping and receiving dock in bakery and warehouse. Rodent excreta pellets

were observed among bags of sawdust (175) or wood shavings.

Is that a correct statement, sir, of the objectionable conditions listed in the letter, sir? A. I believe you read the letter as it is written.

Q. Now, those conditions existed in March of 1970 in a warehouse in Philadelphia, is that correct, sir?

(Mr. Pierson) Objection, sir. He did not say he knew anything about it. He said he got the letter. He didn't say that he knew they were there.

(The Court) I assume he wasn't aware of those conditions at the time, from what he has indicated, but he did receive a letter, and that was the reference in the letter.

By Mr. Linton:

Q. You were made aware of those facts or those statements in the letter, is that correct?

(Mr. Pierson) Objection.

(The Court) Overruled.

By Mr. Linton:

Q. You were aware of those statements in that letter—

(Mr. Pierson) Objection, repetitious.

(The Court) Overruled.

By Mr. Linton:

Q. You were aware of it? (176) A. I read the letter and would be aware of the contents.

Q. And this was at the same time that Mr. Bronsdon and Mr. Fahlhaber and the gentlemen who headed the Philadelphia warehouses were all under your direction and responsible for sanitation? A. In 1970, the situation you described—That is Mr. St. John, is the name of the gentleman you are referring to.

Q. And while you had delegated responsibilities for sanitation to those persons in March of 1970, apparently the job wasn't getting done.

(Mr. Pierson) Objected to, Your Honor, Argumentative.

(The Court) Sustained.

By Mr. Linton:

Q. In spite of their being delegated the responsibilities, you still received a letter complaining of conditions in the warehouse, didn't you?

(Mr. Pierson) Objection. The thing speaks for itself.

(The Court) Overruled.

(The Witness) Mr. St. John's responsibility was supervision of the operation of the warehouse, not just sanitation, sir.

(177) By Mr. Linton:

Q. But Mr. Fahlhaber and Mr. Bronsdon were supposed to be responsible for sanitation. A. Mr. Fahlhaber is responsible for all engineering of our company, and one of the gentlemen who reports to him is Mr. Bronsdon, who is responsible for sanitation and inspection.

Q. And this same set of persons, except that Mr. McCahan is the divisional vice-president, rather than Mr. Hammel up there, were responsible for seeing that the Baltimore warehouse was sanitary, isn't that correct?

(Mr. Pierson) Objection.

(The Court) Overruled.

(The Witness) Well, they are two entirely separate divisions.

By Mr. Linton:

Q. But Mr. Fahlhaber and Mr. Bronsdon were responsible in both divisions, and in one Mr. Hammel was and in one Mr. McCahan was, on a divisional level. A. Would you make that statement again?

Q. As to Philadelphia, Mr. Fahlhaber, Mr. Bronsdon, and your divisional man up there—although, they weren't a division at the time—Mr. St. John, were responsible for the sanitation up there in March of 1970. As of November of 1971, Mr. Fahlhaber, Mr. Bronsdon, in this case (178) a different divisional vice-president, Mr. McCahan, was responsible for sanitation in the Baltimore warehouse. A. Responsible for operations.

Q. And sanitation? A. To the extent that is included, sir, yes. I would like to just differentiate that their job is quite broad and complex.

Q. As is yours. A. Yes.

Q. And after the same problem occurred twice, once in Philadelphia and once in Baltimore, did you have any reason to believe that the system you had set up of handling sanitation, the responsibilities you had delegated to others for sanitation, that system just wasn't working, sir? A. Well, the fact that this occurrence occurred in Baltimore indicated that it wasn't working perfectly.

Q. If a system was set up and wasn't working, who was responsible for that, sir? A. In Baltimore, I would hold Mr. McCahan responsible.

Q. Who set up the system, sir? A. The organizational structure has been evolved over a good many years. Actually, I am responsible for the entire organizational structure.

(179) Q. And if a system that is set up and it doesn't work, you are responsible for changing it, is that correct? A. For any result which occurs in our company, I am ultimately the chief executive officer and, therefore, responsible.

(Mr. Linton) No further questions.

REDIRECT EXAMINATION

By Mr. Pierson:

Q. Mr. Park, do you know what happened as a result of the Philadelphia incident? Was there any prosecution of any kind? A. No, not to my knowledge.

Q. Were there any court proceedings of any kind? A. No, not to my knowledge.

Q. And were your people up there able to satisfy the Food and Drug Administration? A That is my impression.

Q. Nothing else ever came to your knowledge that anything in Philadelphia would affect the operation of the system anywhere else? A. That is right, sir. To

my knowledge, corrective action and immediate attention was given, as a result of the letter, in Philadelphia.

Q. And everybody was satisfied? (180) A. I think that is right, sir.

(Mr. Pierson) That is all.

RECROSS EXAMINATION

By Mr. Linton:

Q. How do you know that the Food and Drug Administration was satisfied, sir? A. Well, I have no reason to know that they weren't.

Q. The Food and Drug Administration did hold a hearing with some of your subordinates, did it not, in 1970, didn't it, sir, following this incident? A. I believe so.

Q. Did you attend that hearing, sir? A. No, sir.

Q. Did someone in your behalf attend the hearing, sir? A. I think that the individuals responsible for the operation of these facilities did. This is my impression. I can't recall specifically. If you have the record there, you would know.

(Mr. Linton) No further questions.

REDIRECT EXAMINATION

By Mr. Pierson:

Q. After the Philadelphia episode and the hearing, did you ever get any letter from the Food and Drug Administration saying that they were, in any way, (181) dissatisfied with what had taken place? I am talking about after this hearing. A. I don't recall any, Mr. Pierson.

Q. Did anybody in your organization or from the Food and Drug Administration get in touch with you and say that the result of what had been done was unsatisfactory? A. No, sir.

(Mr. Pierson) That is all.

RECROSS EXAMINATION

By Mr. Linton:

Q. Well, you do stand before the jury as a criminal Defendant today, don't you?

(Mr. Pierson) Now, what was that for?

(The Court) I don't know. Do you object?

(Mr. Pierson) Certainly I object.

(The Court) Sustained.

(Mr. Linton) No further questions.

(The Court) Anything else?

(Mr. Pierson) If you want to know whether he is the Defendant, I am willing to stipulate that he is the Defendant.

(The Court) I will take judicial notice of that. Anything else, gentlemen?

(Mr. Pierson) No, Your Honor.

* * * *

(182) Your Honor, I want to renew our motion for judgment of acquittal at the end of the entire case.

(The Court) Very well. Motion is denied.

* * * *

(194) [Closing argument] (Mr. Linton:) That brings us to the third question that you must decide, and that is whether Mr. John R. Park is responsible for the conditions persisting. Let me talk generally about the kind of offense we have here. This is not an offense like a bank robbery. This is not an offense like a theft, a rape. This is not an offense where a member of the community, who, doesn't deserve any respect in the first place, probably by virtue of his lifestyle, goes out and commits a crime. This isn't the kind of conduct that one knows as criminal when he engages in it. You walk into a bank, stick a gun in a person's face, and the person who is acting knows he is committing a crime. He knows that it affronts a community standard. When you are talking about public health and public safety, different standards have to apply. The public cannot protect itself against certain forms of contamination. The law, therefore, (195)

imposes upon those persons who are going to deal in drugs or cosmetics or food, anything which may endanger human health, imposes upon those people who engage in that business a responsibility for knowing that they produce is healthful.

Now, Mr. John R. Park is the president and chief executive of Acme Markets. His responsibility, as he testified, includes all operations of the company. According to the bylaws of the company which were read to you by the vice-president and general counsel, Mr. Gilfillan, includes general and active supervision of all phases of the company's operations and business. Now, what should we interpret this to mean? Well, I wouldn't say that that means that Mr. Park should be standing outside of every warehouse waiting for a rat to try to get in. That would be simply impossible. What I think it should reasonably mean, though, is that, as president, he should be held responsible for setting up a system, a system of sanitation, of delegating responsibility in a way that he is sure the job will get done, of using Mr. Fahlhaber and Mr. Bronsdon, his various division vice-presidents, in a fashion that ensures that that responsibility, or anyone engaging in any business which may affect human health, does the job in a sanitary fashion.

Apparently, there was some such system, in a (196) sense. Mr. Fahlhaber was generally responsible, that is, another vice-president was generally responsible for the technical aspects of sanitation. Mr. Bronsdon, a very reputable sanitation engineer, was his subordinate in that business of the technical aspects of sanitation. But, it was Mr. McCahan, that is, a divisional vice-president, who, according to the testimony, was supposed to be responsible for everything that went on in the Baltimore division and, therefore, the Baltimore warehouse. Unfortunately, Mr. Bronsdon didn't work for him. Mr. Brondson worked up in Philadelphia. He worked under Mr. Fahlhaber. He would come down when there were requests and when there were problems, but he was up in Philadelphia. He wasn't under Mr. McCahan's direction down here.

That same kind of relationship had persisted not only in November of 1971, when these inspections occurred, and again in March of 1972, when these inspections occurred, they occurred back in March of 1970. In March of 1970, Mr. Park was informed that in a warehouse up in Philadelphia, the same kinds of problems that we have just presented evidence on, and which I just showed you photographs on, had existed up in a warehouse in Philadelphia. And, at that time, the same system for ensuring the sanitary conditions—that is, Mr. Fahlhaber and Mr. Bronsdon and a divisional vice-president. It was Mr. St. John or someone (197) in warehousing at the time. The same crew of people, with the exception of the fact that it arises in a different district or division, have allowed this to occur, potential rodent entryways were noted by ill fitting doors and doors in disrepair at southwest corner of warehouse. This is exactly what was uncovered in the November inspection of 1971 in Baltimore. It is the same condition that was uncovered in March of 1972 in the warehouse in Baltimore.

Number two, rodent nesting, rodent excreta pellets, rodent stained bale bagging and rodent gnawed holes noted among bales which were stored in the warehouse. Now, this was the Philadelphia warehouse. That is the same thing that happened in November of 1971 and March of 1972 in Baltimore.

The point is that, while Mr. Park apparently had a system, and I think he testified the system had been set up long before he got there—he did say that if anyone was going to change the system, it was his responsibility to do so. That very system, the system that he didn't change, did not work in March of 1970 in Philadelphia; it did not work in November of 1971 in Baltimore; it did not work in March of 1972 in Baltimore, and under those circumstances, I submit, that Mr. Park is the man responsible. The other people were part of the system. They may have had functions to perform. I dare say they probably failed (198) to perform their functions as they probably should have. The fact of the matter is that nobody was doing their job. When a system doesn't work, when a system breaks down three times, then the man at

the top, the man who sets the system, Mr. John R. Park, should be responsible.

* * * *

(212) Mr. Park was responsible for seeing that sanitation was taken care of, and he had a system set up that was supposed to do that. This system didn't work. It didn't work three times. At some point in time, Mr. Park has to be held responsible for the fact that his system isn't working, and I submit to you that that is why nothing was done at the Philadelphia warehouse the first time. Much ado was made about the fact that nothing was done the first time. Well, should we have done anything the first time? In the evidence before you, that is the first instance in which Mr. Park was put on notice that his system wasn't working. When things broke down in the Philadelphia warehouse, he should have been on notice that Mr. Fahlhaber and Mr. Bronsdon and his divisional vice-president weren't doing their jobs, whatever they were supposed to be doing, talking about the problems and talking about how to solve the problems, it wasn't getting done. At that point in time, Mr. Park should have known his system wasn't working, and he should have done something about it.

That was true, again, after the November inspection. It was again present in January of 1972. It (213) was saying, again, your system has broken down. It is not working. You have got to do something about it. What is done? What was done was all done through the same people, and when it was done in March of 1972, the warehouse was still contaminated.

The Government is not asking you to find Mr. Park guilty because the system broke down. It broke down three times. The first time nothing was done, and it shouldn't have been done. The man had to give Mr. Park a chance to create a system that would work. He didn't do it, and that is the reason you should hold him responsible.

* * * *

(220) [Jury instructions] (The Court:) Now, in this particular case, the Defendant is charged in five counts of violating the law.

The first four counts of the Information concern events that are alleged to have occurred in November and (221) December of 1971.

The first count involves certain boxes of gelatin dessert, Jello. Counts two, three and four involve flour and count five also involves flour, but the time period on count five is different, since this concerned events that occurred in January and February of 1972.

All the counts arise from the alleged rodent infestation of various forms.

The Defendant in this case is charged under Section 331(k) of Title 21 of the United States Code. That provision makes it a criminal offense to do any act with respect to food that is being held for sale after shipment in interstate commerce if the result is adulteration of that food.

In order to find the Defendant guilty on any count of the Information, you must find beyond a reasonable doubt on each count, first, that the food that was held was held for sale in the Acme warehouse after shipment in interstate commerce.

Secondly, that the food involved was held in unsanitary conditions in a warehouse with the result that it consisted, in part, of filth or where it may have been contaminated with filth.

Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, (222) Incorporated.

However, you need not concern yourselves with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets.

The corporation, Acme Markets, Incorporated, has already entered a plea of guilty to the charge placed against it, and, while that plea does not imply, in any way, the Defendant Park is guilty, the fact that the materials in question are foods held for resale after shipment in interstate commerce and held under unsanitary conditions are issues that are beyond question in the case and must be accepted by you.

The statute makes individuals, as well as corporations, liable for violations. An individual is liable if it is clear, beyond a reasonable doubt, that the elements of the adulteration of the food as to travel in interstate commerce are present. As I have instructed you in this case, they are, and that the individual had a responsible relation to the situation, even though he may not have participated personally.

The individual is or could be liable under the statute, even if he did not consciously do wrong. However, the fact that the Defendant is present and is a chief (223) executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue. The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.

* * * *

(226) (Mr. Pierson) On behalf of the Defendant, we feel by the use of the word "responsible," when taken in connection with your use of the word "responsible" as a "responsible officer" may be confusing to the jury. There ought to be some definition of the word "responsible". There ought to be some definition that would be somewhat more broad than you have given in your charge, because you are using the word "responsible" in the legal sense, and the jury may very well be using the word in the colloquial sense.

(The Court) Anything else?

(Mr. Pierson) That is all, sir.

(Mr. Boyd) If I had been saying what Mr. Pierson just said, I would have reverted again to the suggestion I made to you in Chambers and that is, strange though it may seem, to have referred to Dotterweich. There is language in that case which you have not used in connection with your charge.

(The Court) There is language in there that I have not used, and I think it is mostly language that you would have not wanted me to use. I have read it, and I don't think you want me to use it.

(Mr. Boyd) I wanted to use it the way I understand it.

(The Court) I don't understand it the same way (227) you do.

(Mr. Boyd) I think the definition of "responsible" was far stricter and tighter than the law requires it to be.

(The Court) Let me say this, simply as to th definition of the "responsible relationship." Dotterweich and subsequent cases have indicated this really is a jury question. It says it is not even subject to being defined by the Court. As I have indicated to counsel, I am quite candid in stating that I do not agree with the decision; therefore, I am going to stick by it.

(Mr. Pierson) I don't think it is entirely clear in the decision whether he was "responsible." There is basically—

(The Court) You have your objection.

* * * *

Let the record show—I suppose you still have your objection and wish to renew your motion for judgment of acquittal?

(228) (Mr. Pierson) Yes.

As to the material on cross examination, we would like to move to strike what was admitted, subject to exception, that was just as to the Philadelphia matters.

(The Court) You objected at the time.

(Mr. Pierson) We would like to have the exception shown in the record.

(The Court) I understand.

Overruled. I have denied your motion for judgment of acquittal, and I do so again.

* * * *

Exhibit 23

DEPARTMENT OF HEALTH EDUCATION,
AND WELFARE

Public Health Service
Food and Drug Administration

Baltimore District
900 Madison Avenue
Baltimore, Maryland 21201
Telephone: 301-862-3396

January 27, 1972

Mr. John R. Park, President
Acme Markets, Inc.
124 North 15th Street
Philadelphia, Pennsylvania 19102

Dear Mr. Park:

We have recently completed a thorough review of the report of an inspection made of your Baltimore warehouse complex during the period of November 29, 1971 through December 14, 1971, as well as analytical reports of samples collected during this inspection.

We note with much concern that the old and new warehouse areas used for food storage were actively and extensively inhabited by live rodents. Of even more concern was the observation that such reprehensible conditions obviously existed for a prolonged period of time without any detection, or were completely ignored. This is evidenced by the many different lots of food products actually defiled by rodents. The details of such findings were set forth in a written list which was submitted to your warehouse management personnel at the conclusion of this inspection. In an effort to be helpful, we are attaching a copy of this list for your ready reference.

Although management at the warehouse during the course of this inspection was cooperative and on their own volition subsequently destroyed the food products in question; nevertheless, the gross insanitary conditions and actual food contamination as noted constitute a serious violation of the law.

We trust this letter will serve to direct your attention to the seriousness of the problem and formally advise you of the urgent need to initiate whatever measures are necessary to prevent recurrence and ensure compliance with the law.

Sincerely yours,

/s/ Norman Kramer
Food and Drug Officer
Baltimore District

Enclosure

cc: Mr. Robert McCahan
Vice President in Charge
of the Baltimore Division

Exhibit 24

ACME MARKETS, INC.
908 York Road, Towson, Md. 21204

Robert W. McCahan
Division Manager

February 7, 1972

Dr. Norman Kramer
Food and Drug Officer
U.S. Food and Drug Administration
900 Madison Avenue
Baltimore, Maryland 21201

Dear Dr. Kramer:

Mr. Park has asked me to write to you and give you a report on the steps we have taken to correct the situation relative to the findings set forth in the written list attached to your letter to Mr. Park dated January 27, 1972.

On Page One of the "List of Observations," Inspectors Brown and Merritt begin by summarizing the general conditions they found at our Distribution Center during the inspection period. They then go on to describe specific observations made in various parts of the complex. It will be my intention here to respond in the same sequence as listed on your report.

1. Increased efforts were made in baiting throughout the building for rodents. To the best of our knowledge, all rats have been eliminated and with the exception of a few isolated instances, all mice have been eliminated. During the inspection, the company's pest control contractor was called in with a crew of 4 men to properly bait the entire Distribution Center. Since that time, the pest control contractor has spent additional hours along with company personnel in the rodent elimination program.

2. The entire Distribution Center has been cleaned and, wherever possible, merchandise has been moved 18 inches away from the walls in order that these areas may be maintained in sanitary condition.

3. The entire building has been inspected and made as rodent-proof as possible.

4. All of the premises including those belonging to Acme and the adjacent railroad property have been cleaned of trash and treated for rodent infestation.

5. All of the rodent defiled food products encountered by the inspectors were destroyed in accordance with their requests and under their supervision.

The cost of this merchandise amounted to $15,425.46. In addition, we have destroyed miscellaneous small quantities of rodent defiled merchandise found by our own supervisory staff in the course of their daily duties.

6. All dry rodent bait boxes have been covered with heavy plywood to prevent containers from being damaged resulting in the spilling of rodenticides. Liquid bait stations have all been changed from plastic containers to either glass and metal or to a new type of small plastic container. These bait stations have been protected by a piece of steel so that they are available to the rodents and to the service men, but cannot be damaged by material handling equipment.

7. Hazardous household products found stored near food products have been relocated. At the time of the inspection, all non-food products were placed in pallet racks located below food products in order to avoid any possible contamination. At this point, we have all but completed the entire relocation of all non-food products to two specific aisles in the Distribution Center in order to completely separate this type of merchandise from food products.

8. As a result of observations relative to probable rodent entry to the buildings, we have made extensive repairs to overhead doors, unpainted surfaces, dock ladders, and all openings to prevent rodent entry.

The cost of this work was approximately $1,000.

9. All broken windows have been replaced.

10. Throughout the "List of Observations", the inspectors pointed out evidence of rodent infestation in the form of rat and mouse pellets, etc. All areas including selection areas, shipping and receiving platforms, storage boxes, and offices have been thoroughly cleaned and

scrubbed and are being maintained in clean condition.

In order to accomplish this work, we purchased a heavy duty scrubbing machine at a cost of $5,600. We hired 10 porters to supplement our existing sanitation crew at a continuing cost of approximately $1,000 per week.

We also have initiated the use of approximately 80 additional hours per week for material handling personnel for the express purpose of moving merchandise in order to permit adequate cleaning of the floor and wall surfaces. This effort represents an approximate additional cost of $500 per week.

11. We have installed rodent-proof ladders at the rail sidings to enable receiving personnel to get to the track level. All wooden pallets formerly used for this purpose have been removed.

12. Caustic cleaning materials, etc. have been removed from the selection and storage areas of the Distribution Center and are now kept in the maintenance areas.

13. We have initiated more stringent control on rotation.

14. All melon and pumpkin crates containing straw have been thoroughly cleaned and removed to a section of our north trailer lot.

15. We have reduced the over-crowded condition in the warehouse by reducing inventory. It is our intent to maintain the inventory at a level that will permit cleaning as well as afford mobility to the material handling equipment throughout the Distribution Center.

16. In many aisles that were at the time of the inspection dimly lit, fluorescent lighting fixtures have been installed.

17. All fluorescent lights in the bakery processing area have been covered with plastic shields and the remainder of all lights throughout the bakery shall be covered in the near future.

Perhaps of greatest importance has been the effort made by William Bronsdon, Sanitation and Inspection Engineer, and his associates and Edwin Zahn, Distribution Center Manager, and his supervisory staff. Meetings were held with each shift of the warehouse operation on

company time for the purpose of reviewing and informing all personnel of the required standards with regard to sanitation which must be maintained. I think Messrs. Bronsdon and Zahn covered the area very thoroughly and were particularly pleased with the positive response from our employees.

As part of our continuing program, weekly inspections of the Distribution Center facility have been made by both Corporate and Division sanitation personnel in order to insure maintenance of sanitary conditions.

I believe that you will agree that we have made strenuous and expeditious efforts to correct the unfortunate situation disclosed in said list. I want to assure you that we will do our utmost to fully comply with all of the statutes, rules, regulations, and orders applicable to matters of this nature and to prevent any recurrence of this situation in the future.

Sincerely,

/s/ Robert W. McCahan

cc: Mr. John R. Park
RWMcC/dew

GOVERNMENT EXHIBIT 27

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

April 24, 1970

Acme Markets Inc.
124 N. 15th St.
Phila., Penna.
Attn: Mr. John Parks, President

Dear Mr. Parks:

This letter is written in response to widespread industry requests for reports to top management of inspectional findings of significant adverse conditions which should be corrected.

An inspection was made of your firm at 59th and Upland Way, Phila., Pa. on March 23, 26, 1970 by inspectors from our Philadelphia Office. The inspectors left written lists of observations and discussed the observations with the management at this location.

The inspection revealed objectionable conditions in your food storage warehouse. Objectionable conditions included:

1. Potential rodent entry ways were noted via ill fitting doors and door in irrepair at Southwest corner of warehouse; at dock at old salvage room and at receiving and shipping doors which were observed to be open most of the time.
2. Rodent nesting, rodent excreta pellets, rodent stained bale bagging and rodent gnawed holes were noted among bales of flour stored in warehouse.
3. Potential rodent harborage was noted in discarded paper, rope, sawdust and other debris piled in corner of shipping and receiving dock near bakery and warehouse doors. Rodent excreta pellets were observed among bags of sawdust (or wood shavings).

This letter is not intended to imply that the Food and Drug Admin. will or will not recommend any civil or

criminal action. The letter in no way relieves your firm or its personnel from all responsibility to take steps to assure compliance with the Food, Drug and Cosmetic Act. It is not intended as an all inclusive report on objectionable conditions. It must not be used in part or in whole in the promotion of your firm's products or facility.

Sincerely yours,

IRWIN B. BERCH
District Director

SRY/sg
cc: Penna. Dept. of Health

JUDGMENT OF CONVICTION

(34) (The Court) Gentlemen, as to Count I, it is adjudged that the Defendant pay a fine to the United States in the sum of $50.00.

As to Count II, it is adjudged that the Defendant pay a fine to the United States of $50.00.

As to Count III, it is adjudged that the Defendant pay a fine to the United States in the sum of $50.00.

As to Count IV, it is adjudged that the Defendant pay a fine to the United States in the sum of $50.00.

(35) As to Count V, it is adjudged that the Defendant pay a fine to the United States in the sum of $50.00.

GOVERNMENT'S REQUESTED INSTRUCTION NO. 3

In order to find a defendant guilty on any count, you must find beyond a reasonable doubt for that count:

1. That the food involved was held for sale in the defendant's warehouse after shipment in interstate commerce.
2. That the food involved was held under insanitary conditions in the warehouse with the result that it consisted in part of filth *or* whereby it *may* have become contaminated with filth.
3. As to the corporate defendant, Acme Markets, Inc., that the food was held for sale in the Acme Markets, Inc., warehouse, in the conduct of its business.
4. As to the defendant, John R. Park, that he held a position of authority and responsibility in the operation of the business of Acme Markets, Inc.

21 U.S.C. 331(k)

21 U.S.C. 342(a)(3)

21 U.S.C. 342(a)(4)

United States v. *Dotterweich*, 320 U.S. 277 (1943)

Berger v. *United States*, 200 F.2d 818 (C.A. 8, 1952)

United States v. *Kaadt*, 171 F.2d 600 (C.A. 7, 1948)

SUPREME COURT OF THE UNITED STATES

No. 74-215

UNITED STATES, PETITIONER

v.

JOHN R. PARK

ORDER ALLOWING CERTIORARI—Filed November 11, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 564960 82